STATE OF MICHIGAN

COURT OF APPEALS

KENNETH MOHR and EDWARD DOUGLAS,

Plaintiffs-Appellants,

v

CHALLENGE MACHINERY COMPANY, d/b/a CHALLENGE GRAPHIC EQUIPMENT COMPANY and CHALLENGE TECHNOLOGIES,

Defendant-Appellee.

UNPUBLISHED
April 25, 1997

No. 196102
Ottawa Circuit Court
LC No. 95-23197-CZ

Before: Taylor, P.J., and Hood and Gribbs, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order of summary disposition entered in favor of defendant Challenge Machinery Company. Plaintiffs claim that the trial court erred in finding that plaintiffs failed to present sufficient statistical proof of age discrimination to create a genuine issue of material fact. We affirm.

In this case, plaintiffs have made only a claim of disparate treatment, which requires a showing of either a pattern of intentional discrimination against a protected class of employees or against an individual plaintiff. MCL 37.2101 *et seq*.; MSA 3.548(101) *et seq*.. *Lytle v Malady*, 209 Mich App 179, 184-185; 530 NW2d 135 (1995), lv granted 451 Mich 920 (1996). Plaintiffs do not dispute that defendant decided to lay off employees out of economic necessity; however, they maintain that age was one of the factors defendant considered in selecting them for layoff. See *Meeka v D & F Corp*, 158 Mich App 688, 691-692; 405 NW2d 125 (1987) (age does not have to be the sole factor for the discharge, as long as it is one of the determining factors). Plaintiff Kenneth Mohr was fifty-three years old at the time of his layoff on September 18, 1992. Plaintiff Edward Douglas was sixty years old when he was laid off by defendant on September 8, 1992. Plaintiffs' indefinite layoffs were converted to terminations after six months pursuant to company policy.

In a case where a plaintiff is discharged as the result of an employer's economically motivated reduction in force, a prima facie case of disparate treatment requires an initial showing, by a

preponderance of the evidence, that (1) the plaintiff was within the protected class and was discharged or demoted, (2) the plaintiff was qualified to assume another position at the time of discharge or demotion, and (3) age was a determining factor in the employer's decision to discharge or demote the plaintiff. *Lytle, supra* at 186. The first element is clearly satisfied in this case because both plaintiffs are over forty and were discharged by defendant. *Paulitch v Detroit Edison Co*, 208 Mich App 656, 658; 528 NW2d 200 (1995) (employees between the age of forty and seventy constitute a protected class). This Court has not been presented with sufficient evidence to determine whether plaintiffs were qualified to assume other positions. Instead, this case focuses on the third element, whether age was a determining factor in defendant's decision to lay off and ultimately terminate plaintiffs.

A plaintiff can establish a claim of disparate treatment with sufficient direct or indirect evidence of intentional discrimination. *Lytle, supra* at 185. Direct evidence of disparate treatment would be evidence that, if believed, would prove the existence of the employer's illegal motive without benefit of presumption or inference. *Id*. Plaintiffs have not presented any direct evidence of intentional age discrimination in this case. Rather, plaintiffs seeks to establish their prima facie case through the use of one form of indirect or circumstantial evidence: statistics. Statistical data demonstrating an employer's pattern of conduct toward a protected class as a group can, if unrebutted, create an inference that a defendant discriminated against individual members of the class. *Barnes v Gencorp Inc*, 896 F2d 1457, 1466 (CA 6, 1990). However, the statistics must show a significant disparity and eliminate the most common nondiscriminatory explanation for the disparity. *Id*. This Court has held that federal precedent, while not binding, is persuasive authority in interpreting and applying the Civil Rights Act. *Lytle, supra* at 184.

Therefore, the issue in this case is whether the statistics presented by plaintiffs created a genuine issue of material fact regarding whether age was a determining factor in defendant's decision to discharge them. Plaintiffs make the following statistical argument based upon defendant's employment decisions during the period 1991 to 1993. Before the layoffs, there were thirteen salaried employees born before 1940 and seventy-four salaried employees born after that date. Of the thirteen salaried employees born before 1940, five (or thirty-eight percent) were laid off in 1992. Although one was called back in 1993, there was a net reduction of thirty-one percent of the salaried employees born before 1940. With regard to the class of employees born after 1940, nineteen were laid off between 1991 and 1993, for a reduction of twenty-six percent. However, during that same period, five of the employees in the class were called back to work and there were at least ten new hires. Subtracting the five callbacks and ten new hires from the nineteen who were laid off, leaves a net reduction of only five percent for those employees born after 1940. Plaintiffs contend that the net reduction of thirty-one percent in the class of employees born before 1940, versus a net reduction of only five percent in the class of employees born after 1940, is evidence from which a reasonable trier of fact may infer age discrimination.

Review of a motion for summary disposition is de novo. *Baker v Arbor Drugs*, 215 Mich App 198, 202; 544 NW2d 727 (1996). A motion under MCR 2.116(C)(10) tests the factual basis underlying the plaintiff's claim. This Court's task is to review the record evidence and all reasonable inferences drawn from it and decide whether a genuine issue regarding any material fact exists to

warrant a trial. *Id.* We conclude that the trial court did not err in finding that plaintiffs' statistical evidence failed to create a genuine issue of material fact. There are significant flaws in plaintiffs' statistical analysis. First, this Court is not convinced that plaintiffs may rely on the recalled and newly hired employees. The hiring of younger employees in the same or different positions as little as three months after a plaintiff's termination is insufficient evidence to meet a plaintiff's burden. *Nesbit v Pepsico, Inc*, 994 F2d 703, 704 (CA 9, 1993); *Rose v Wells Fargo & Co*, 902 F2d 1417, 1422 (CA 9, 1990). Moreover, a plaintiff who has been terminated as part of a corporate reorganization carries a greater burden of supporting charges of discrimination than an employee who was not terminated for similar reasons. *Simpson v Midland-Ross Corp*, 823 F2d 937, 941 (CA 6, 1987).

Furthermore, insufficient evidence has been presented concerning who made the recall/hiring decisions, what types of skills the recalled/newly hired employees possessed, and the ages of the individuals in the hiring pool. Nor is there evidence regarding precisely when the recall and hiring decisions were made in relationship to plaintiffs' layoffs. The only information provided concerns plaintiff Douglas' replacement, Mike Baker. Douglas' duties as an "NC Programmer" were combined with a design engineering position during the reduction in force. Although Baker was younger, James Ritsema, defendant's chief executive officer, claimed that Baker was given the position because he had more education, experience, and training than Douglas, particularly in the area of design engineering. It should also be noted that one of the recalled/newly hired employees was fifty-nine years old, which seems inconsistent with a plan to eliminate older employees from the work force. Therefore, the connection between plaintiffs' layoff and the subsequent recalls/new hires is tenuous at best.

Using plaintiffs' method of calculation, but excluding recalls and rehires, thirty-eight percent (5/13) of the employees born before 1940 were laid off, versus twenty-six percent (19/74) of the employees born after 1940. These figures reflect a much smaller disparity between the number of employees born before 1940 who were laid off and the number of employees born after 1940 who were laid off. In one case cited by plaintiffs, *Polstorff v Fletcher*, 452 F Supp 17, 22 (ND Ala, 1978), the court held that the statistical evidence was sufficient to support a finding of age discrimination when thirty percent of all employees fifty-five years of age and older were affected by the reduction on force, whereas only 3.5 percent of all employees under fifty-five years of age were affected. Once the recalls and rehires are excluded, *Polstorff* is not helpful to plaintiffs because the disparity in that case (26.5 percent) is much more significant than the disparity that exists here (twelve percent).

Plaintiffs also cite *Marshall v Sun Oil Co*, 605 F2d 1331, 1336 (CA 5, 1979). Rather than calculating the percentage of employees who were laid off in each class as plaintiffs do in this case, the court compared the proportion of employees who were terminated in the class to the proportion of employees in the class before the layoffs. For example, in *Marshall*, sixty percent of the employees terminated were over fifty, while before the reorganization only twenty-nine percent of Sun's employees were over fifty. *Id*. at 1333. Similarly, twenty-four percent of the employees terminated were over sixty years of age while employees over sixty had comprised only three percent of Sun's workforce. *Id*. On the other hand, only fifteen percent of those employees terminated were under forty years old, when they made up 33.5 percent of the work force before the reorganization. *Id*. The court held that the statistical evidence contributed to a finding of a prima facie case. *Id.* at 1336.

In this case, plaintiffs claim that there were eighty-seven employees: thirteen born before 1940, and seventy-four born after 1940. In addition, plaintiffs claim that there were twenty-four employees laid off: five born before 1940, and nineteen born after 1940. Excluding recalls and rehires, twenty-one percent (5/24) of the employees laid off were born before 1940, while those employees made up fifteen percent (13/87) of the work force before the layoffs. In comparison, seventy-nine percent (19/24) of the employees laid off were born after 1940, while they made up eighty-five percent (74/87) of the work force before the layoffs. In *Marshall*, the proportion of employees over age fifty who were laid off far exceeded the proportion of employees in the same class before the layoffs, while the number of employees under forty who were terminated was significantly lower than the number that existed before the layoffs. However, in the instant case the proportions are much more even. While the layoffs were proportionally higher in this case for those born before 1940, the difference is slight and cannot be compared to the extreme disparity that existed in *Marshall*.

Finally, *EEOC v Sandia Corp*, 639 F2d 600, 623 (CA 10, 1980), can also be distinguished from this case. In *Sandia*, employees over fifty-two made up about thirty-eight percent of the employees terminated during a reduction in force, while they made up only about fourteen percent of the work force. *Id*. at 608. Again, this disparity (twenty-four percent) is much greater than the statistical disparity in this case. Furthermore, in *Sandia*, the plaintiff presented significant nonstatistical evidence that contributed to the finding of a prima facie case. The plaintiff introduced management and supervisory memoranda and personnel reports that indicated that older, nonsupervisory employees were stereotyped as unproductive and technically obsolete and that the company's management was convinced that "new blood" was the company's future due to rapidly changing technology, etc. *Id*. at 608. Plaintiffs in this case did not come forward with any similar evidence of a discriminatory motive or intent on the part of defendant.

Moreover, unlike the situation in *Sandia*, there is no evidence that plaintiffs themselves were selected for layoff on the basis of their age. There is overwhelming evidence that defendant had a legitimate, nondiscriminatory reason for laying off plaintiffs, i.e., economic necessity. Plaintiffs admit that there were no age-related remarks, that age was never mentioned as being a problem, that they were not aware of discrimination against other older workers before the reduction in force, and that older employees within the same departments were retained and that younger employees in the same department were let go. On the basis of the statistical evidence alone, no reasonable juror could conclude that age was a factor in selecting plaintiffs for layoff and termination. See, e.g., *Barnes, supra* at 1468 (while valid statistics may be used to establish a prima facie case, statistics cannot determine whether the more likely cause for the statistical disparity is the defendant's bias or a legitimate criterion).

Finally, even if we were persuaded that plaintiffs' statistical evidence established a prima facie case, we still would affirm for lack of other evidence of discrimination. *Manzer v Diamond Shamrock*, 29 F3d 1078, 1084 (CA 6, 1994) (in reduction in force cases, a plaintiff may no longer rely simply on prima facie evidence, but must, instead, introduce additional evidence of age discrimination). See further, Ludolph & Caliman, *Corporate Reorganizations and Age Discrimination*, 77 Mich B J, 1174-1178 (1995) (job elimination cases require a "heavier burden of proof"; plaintiff has an "increased burden" of producing evidence that age was the determining factor in the adverse

employment decision by providing additional evidence of age discrimination; courts are now imposing a "more stringent burden of proof" on plaintiffs alleging age discrimination in the context of corporate reorganizations of work force reductions).

Affirmed.

/s/ Clifford W. Taylor
/s/ Harold Hood
/s/ Roman S. Gribbs